Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM MULDERIG,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

DOUGLAS W. DUNHAM
*Counsel of Record*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
*Attorneys for Petitioner*
*William Mulderig*
919 Third Avenue
New York, New York 10022
(212) 735-3000

*Of Counsel:*
MICHAEL D. RIPS
ELLEN P. QUACKENBOS
WILLIAM J. HINE

Dated: November 12, 1997

10288

## QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in ruling that, in demonstrating a due process violation based on preindictment prosecutorial delay, a defendant who has suffered substantial prejudice resulting from that delay must also prove that the delay was the result of prosecutorial bad faith — a ruling that, as the Fifth Circuit and United States Solicitor General have recently acknowledged, is in direct conflict with rulings by the Fourth, Seventh, Eighth, and Ninth Circuits.

2. Whether the Fifth Circuit erred in ruling that a criminal defendant can unknowingly waive a statute of limitations defense under 18 U.S.C. § 3283 where the defense was raised prior to sentencing and where there was no express waiver — a ruling that is in direct conflict with decisions by the Tenth and Sixth Circuits.

3. Whether the Fifth Circuit erred in ruling that a factually true financial statement submitted to a bank by a private borrower can be the basis for a prosecution under 18 U.S.C. § 1008 for filing a false statement — a ruling that contravenes the reasoning of *United States v. Bronston*, 409 U.S. 352 (1973).

## PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, William Mulderig ("Mr. Mulderig" or "Petitioner"), is an individual and, as such, has no corporate relationship. Mr. Mulderig was a defendant in the underlying action in the United States District Court for the Eastern District of Louisiana and defendant-appellant--cross-appellee before the United States Court of Appeals for the Fifth Circuit.

Respondent is the United States of America ("Respondent" or "the government"). Respondent was the plaintiff in the underlying action before the United States District Court for the Eastern District of Louisiana and the plaintiff-appellee--cross-appellant before the United States Court of Appeals for the Fifth Circuit.

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NO. _____

# SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM MULDERIG,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Petitioner William Mulderig ("Mulderig") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (attached hereto as Appendix A) is reported at *United States v. Mmahat*, Crim. A. No. 93-490N, 1994 U.S. Dist. LEXIS 13862 (E.D. La. Sept. 28, 1994). The opinion of the United States Court of Appeals for the Fifth Circuit (attached hereto as Appendix B) is reported at *United States v. Mulderig*, 120 F.3d 534 (5th Cir. 1997).

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1997, and William Mulderig's timely request for rehearing *en banc* was denied on September 12, 1997. *See United States v. Mulderig*, __ F.3d __ (5th Cir. (La.) Sept. 12, 1997) (TABLE, No. 95-30206, 95-30253, 97-30123). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

### Background

William Mulderig was a successful businessman and real estate developer. In June 1984, four officials of Gulf Federal Savings Bank ("Gulf Federal") approached Mr. Mulderig and his financial advisor, James Burns, to inquire as to whether Mr. Mulderig or one of his companies would be interested in purchasing a real estate project known as Cypress Park, located in Gretna, Louisiana.

After extended negotiations, K & K Financial Services, Ltd. ("K & K"), a company owned by Mr. Mulderig, agreed to purchase the project. As part of that transaction, which closed on December 28, 1984, Gulf Federal loaned $2,169,000 to K & K for the purchase of Cypress Park. Of that amount, $2,069,000 was paid back to Gulf Federal to satisfy the mortgage of the former owners. The remaining $100,000 went to improving and marketing the property. The K & K loan was secured by a mortgage on the property and by Mr. Mulderig's personal guarantee. Mr. Mulderig's net worth at the time was approximately $13 million.

In November 1984, Mr. Mulderig was contacted by Gulf Federal loan officer Michael Farley, who asked whether Mr. Mulderig would be interested in purchasing another project in Louisiana known as the Nel Place Apartments. When Mr. Mulderig expressed his reluctance, Gulf Federal offered to loan him, in addition to the $1,600,000 needed to purchase Nel Place, $850,000 for use in his ongoing businesses. Dermul Management, Ltd. ("Dermul"), one of Mulderig's companies, agreed to purchase Nel Place on the above terms, provided Gulf Federal also loaned Dermul an additional amount for the improvement and marketing of Nel Place. Gulf Federal agreed to that condition, and Dermul was given the loan. The entirety of the loan was secured by the Nel Place property, which was appraised at a value in excess of the amount loaned. As additional security, Mr. Mulderig personally guaranteed the $850,000, which was to be used in his other businesses. Of the amount loaned, Mulderig paid $1.6 million to Gulf Federal to satisfy the mortgage of the previous owner.

In the summer of 1987, Mr. Mulderig was subpoenaed to appear before the grand jury in connection with the government's investigation of Gulf Federal and several of its officers. At that time, Mr. Mulderig was informed that he was neither a subject nor target of the investigation.

On or about December 12, 1993, nearly ten years after the events in question, eight years after the start of the investigation, and six years after Mr. Mulderig was told he was neither a target nor a subject of investigation, Mulderig and certain officers of Gulf Federal were indicted in the Eastern District of Louisiana for alleged violations of federal bank regulations.

**Prejudicial Preindictment Delay**

Prior to trial, Mr. Mulderig moved to dismiss the indictment owing to prejudicial preindictment delay, contending that

during the decade that had elapsed between the relevant events and the indictment he had suffered actual and substantial prejudice in his ability to defend himself against the charges, and that such prejudice was caused by the government.

On September 6, 1994, after an evidentiary hearing, District Court Judge Ginger Berrigan held that Mr. Mulderig had sustained actual and substantial prejudice due to the preindictment delay. *See United States v. Mulderig*, Crim. A. No. 93-490C, 1994 U.S. Dist. LEXIS 12678, at *17 (E.D.La. Sept. 6, 1994) (attached hereto as Appendix C). (App. 47-48a). The district court found that the government's representation to Mulderig in 1987 that he was neither a target nor a subject of the investigation caused him not to preserve exculpatory testimonial and documentary evidence that was subsequently lost during the nearly ten year period of delay. (App. 42-43a).

Critical to Judge Berrigan's finding of prejudice was Mr. Mulderig's failure to preserve the exculpatory testimony and documents of James Burns, Mulderig's accountant and financial advisor. James Burns, who was integral to Mr. Mulderig's business operations, conducted the bulk of the negotiations and made the financial arrangements for the transactions at issue in this case. Burns participated in Mr. Mulderig's meetings with Gulf Federal officials and maintained extensive files of the Gulf Federal transactions. Burns died in 1989, well after the government had informed Mr. Mulderig that he was neither a target nor subject of the Gulf Federal investigation but before the government decided to indict Mr. Mulderig. In addition to losing Burns' exculpatory testimony, Burns' notes and files were lost. (App. 43-46a).

On the issue of preindictment delay, the district court, after an evidentiary hearing, concluded:

> The evidence presented convinced the court that Mr. Burn [sic] was intimately involved with the transactions in this case and Mr. Mulderig substantially relied upon him in that regard; that Mr. Burn [sic] had high standards of both professionalism and ethics and did not believe the transactions were illegal; that Burn [sic] kept copious notes and records of his communications, including those with Mr. Mulderig and the officers and employees from Gulf Federal, notes and records which are no longer available.

(App. 47-48a). The government made no subsequent attempt to refute this finding of prejudice by the district court.

In addition to the loss of the exculpatory testimony and documents of James Burns, the district court found that Mr. Mulderig was prejudiced by the loss of his own exculpatory documents. At an evidentiary hearing before the district court, a former employee of Mr. Mulderig's identified the categories of office files that were lost, or simply disposed of, during the period of preindictment delay. The lost documents included files concerning the relevant transactions, correspondence files, and telephone, mail, and financial logs which verified when communications, including financial statements, were sent and received by Mr. Mulderig's office. As a result, Mr. Mulderig was left, as acknowledged by the district court, unable to defend himself against the government's charges. (App. 44-45a).

**After Trial, The District Court Affirmed The Finding Of Prejudice**

The district court's pre-trial finding of actual and substantial prejudice resulting from the delay in prosecution was

affirmed by the district court after trial.[1] *See* Order and Reasons, dated September 5, 1996, of Judge Clement, at 1 (attached hereto as Appendix D). (App. 49a). In papers submitted to the district court after trial, Mr. Mulderig detailed how the loss of evidence during the period of preindictment delay prejudiced his ability to defend himself at trial. The government did not contest this post-trial showing of prejudice.

**The District Court Refused To Find A Due Process Violation**

Applying the two-part test subsequently endorsed by the Fifth Circuit's *en banc* decision in *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), *cert. denied sub nom.*, __ U.S. __, 117 S. Ct. 736 (1997), United States District Judge Edith Clement held that Mr. Mulderig — despite having proved actual and substantial prejudice — was also required to demonstrate that the government had intentionally delayed his prosecution for tactical or other bad faith reasons. *See Mmahat*, 1994 U.S. Dist. LEXIS 13862, at *2. (App. 2a). Judge Clement's subsequent procedural decisions, as outlined below, made such a demonstration a virtual impossibility.

Mr. Mulderig proffered evidence to Judge Clement which established that the government had acted in bad faith by intentionally delaying its investigation and indictment to take advantage of parallel civil litigation brought by federal bank regulators between 1986 and 1992 concerning the very loans at issue in the indictment. Mr. Mulderig presented documentary evidence demonstrating that FBI agents in charge of the criminal investigation had coordinated their efforts with attorneys representing federal regulators in the parallel civil litigation. Mr. Mulderig argued

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[1] Prior to trial the case was reassigned from Judge Ginger Berrigan to Judge Edith Brown Clement.

that by delaying the criminal investigation in favor of the civil litigation, the government obtained a road map to his defenses in the future criminal prosecution and improperly engineered his waiver of his Fifth Amendment rights.

Despite the evidence presented to the court concerning the coordination of criminal and civil litigations, Judge Clement denied a defense request to subpoena the government's investigative files and for an evidentiary hearing which would have allowed the defense to examine government agents concerning the reasons for the delay in the prosecution and indictment of Mr. Mulderig. (App. 4a). Instead, Judge Clement permitted the government to submit for *in camera* inspection documents that, in the government's opinion, sufficiently explained the reasons for the delay. *Id.* Mr. Mulderig and his counsel were not allowed to review these documents, nor were they informed of the method by which these documents were selected.

Accepting the government's unsworn representation that the delay was caused by a lack of prosecutorial resources, Judge Clement held that Mr. Mulderig had failed to show that the government delayed the prosecution for tactical or other bad faith reasons. Accordingly, notwithstanding the finding of actual and substantial prejudice, the district court denied Mr. Mulderig's motion for a judgment of acquittal on grounds of prejudicial preindictment delay. *Id.*

**Mulderig's Prejudice Was Compounded By Other Improper Conduct by the Prosecutor**

Mr. Mulderig was subjected to criminal prosecution without the advantage of the exculpatory testimony and documents of James Burns, his accountant and financial adviser, and without the use of many of his own files that would have aided in his defense. The prejudice to Mulderig was compounded by the fact that

the government, having produced 500,000 documents, refused to identify and then affirmatively misled Mulderig and his counsel as to the absence of exculpatory documents (Gulf Federal board resolutions) buried within the production.[2]

Also, during the period of prosecutorial delay, exculpatory files from Gulf Federal were disseminated to other law firms in connection with civil suits involving Gulf Federal. These files, which were not discovered by Mr. Mulderig until after trial, revealed that certain critical elements of the government's case against Mr. Mulderig were false.[3]

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2 With respect to this material, which was discovered by Mr. Mulderig after trial, the district court "acknowledg[ed] [Mulderig's] claim that this evidence could have been potentially material to guilt or innocence and might have affected the jury's verdict if adequately presented." (RE 14). The issue of whether such actions by the government constitute a *Brady* violation is currently the subject of a petition to this Court for writ of certiorari in *McBride v. Johnson*, No. ___, October Term, 1997.

3 Specifically, Mr. Mulderig was convicted on Count 2, for filing a false statement, on the theory that in 1985, after the K & K loan closed in December 1984, officers of Gulf Federal asked Mulderig to provide a 1984 financial statement to make it appear that the bank's files were in order at the time of the closing. The government's "proof" was an unattached letter from Mulderig to Gulf Federal, dated February 1985, which the government maintained was the cover letter for the July 1984 financial statement. *See Mulderig*, 120 F.3d at 548-50. (App. (continued...)

On November 3, 1994, Mr. Mulderig was convicted on six Counts of the ten Count indictment.

**Post-trial Motions And The District Court's Decisions**

In post-trial motions, Mr. Mulderig moved for judgments of acquittal on Counts 1 and 2 based on the statute of limitations. Count 2 alleges a violation of 18 U.S.C. § 1008 for filing a false statement, while Count 1 alleges a conspiracy to, among other things, file a false statement in violation of Section 1008.

The statute of limitations for Section 1008 at the time the alleged offenses were committed was five years, pursuant to 18 U.S.C. § 3282. By the time the indictment was returned, however, the statute had been extended to ten years under 18 U.S.C. § 3293.

A month prior to trial, Congress removed Section 1008 from the ten year limitations period of Section 3293. As a result of this change, violations of Section 1008 were once again governed by the five year period of limitations set forth in 18 U.S.C. § 3282. This change was not known to Mr. Mulderig until the official version of the Federal Criminal Code and Rules was published in the spring of 1995, after trial and before sentencing.

Mr. Mulderig argued that his "trial" and "punishment" occurred beyond the five year period of limitations provided in 18

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[3](...continued)

29-32a). After trial it was discovered by Mr. Mulderig, upon review of files in the possession of a Louisiana law firm, that the February 1985 letter was submitted in connection with an entirely separate transaction, and not as a cover letter to the 1984 financial statement at issue.

U.S.C. § 3282. The District Court rejected the argument holding that the applicable statute of limitations, despite its repeal, was still the ten year period provided in 18 U.S.C. § 3293.

Mr. Mulderig also argued that he was entitled to a judgment of acquittal on Count 2 — a false statement count under 18 U.S.C. § 1008 — because the statement which the government claimed to be false was literally true. The district court ruled that a literally true statement could be "false" for purposes of Section 1008 so long as it was intended to give a misleading impression.

By order dated February 7, 1995, the district court acquitted Mulderig on three of the six Counts (Counts 5, 7, and 8) because of the insufficiency of the evidence. Mr. Mulderig was sentenced on December 18, 1996 to four and one-half years in prison. He has been incarcerated since February 3, 1997.

**The Fifth Circuit Affirmed The Rulings of the District Court**

On August 15, 1997, the Court of Appeals for the Fifth Circuit upheld Mr. Mulderig's convictions on Counts 1-3 and affirmed the district court's judgments of acquittal on Counts 5, 7, and 8. *See* App. 35a.

The Fifth Circuit denied Mr. Mulderig's claim that his due process rights had been violated by the nearly ten year long prosecutorial delay. Though the Fifth Circuit acknowledged that Mr. Mulderig had suffered actual prejudice, the Court, applying the two-part test of *Crouch*, ruled that Mr. Mulderig was required to prove, in addition to actual prejudice, that the "'delay must have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused . . . or for some other impermissible, bad faith purpose.'" *Mulderig*, 120 F.3d at 540 (quoting *Crouch*, 84 F.3d at 1514). (App. 10a).

The Court of Appeals rejected Mr. Mulderig's argument that the statute of limitations precluded his convictions on Counts 1 and 2 of the indictment. Unlike the District Court, which addressed the merits of the defense of the statute of limitations, the Court of Appeals held that Mr. Mulderig had waived the statute of limitations by not raising it at trial. *Id.* at 540. (App. 11a). On the issue of whether a literally true statement could be the basis for a false statement conviction under Section 1008, the Court of Appeals upheld the ruling of the District Court. *Id.* at 548-50. (App. 29-32a).

## REASONS FOR GRANTING THE WRIT

### I. IN HOLDING THAT A DEFENDANT WHO HAS INDISPUTABLY ESTABLISHED ACTUAL AND SUBSTANTIAL PREJUDICE CAUSED BY A NINE YEAR DELAY IN PROSECUTION MUST ALSO BEAR THE BURDEN OF PROVING PROSECUTORIAL BAD FAITH, THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH THE FOURTH, SEVENTH, EIGHTH, AND NINTH CIRCUITS.

This case squarely presents an important issue of constitutional law, which has been the subject of a long-standing conflict among the federal circuits and state courts of last resort. This conflict has recently been acknowledged by the United States Solicitor General as important and necessitating resolution by this Court. The issue is: What is the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment?

Following this Court's decision in *United States v. Lovasco*, 431 U.S. 783 (1977), all circuit courts require that in order to demonstrate a due process violation based on prosecutorial

delay a defendant must show actual and substantial prejudice resulting from the delay of the indictment. Mulderig has satisfied that criterion. The specific issue, as squarely presented by the instant case, is whether a defendant, who (like Petitioner) has demonstrated actual and substantial prejudice, must also prove that the government delayed indictment for tactical advantage or other bad-faith purpose in order to show a due process violation.

### A. The Circuits Are Split On The Test For Determining Prejudicial Prosecutorial Delay

In this case, the Fifth Circuit affirmed its rule that, to establish a due process violation, a defendant must show not only that actual and substantial prejudice was caused by the delay but also that the "delay must have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose." *Mulderig*, 120 F.3d at 540 (quoting *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 736 (1997)). (App. 18a).[4]

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[4] Decisions in accord with *Crouch* include *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 977 (1992); *United States v. Crooks*, 766 F.2d 7, 11 (1st Cir.), *cert. denied*, 474 U.S. 996 (1985); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); *United States v. Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 62 (1995).

This test, applied by the district court and the Fifth Circuit in the instant case, is directly contrary to the test applied by the Fourth, Seventh, Eighth and Ninth Circuits. Those circuits have adopted a balancing test that does not necessarily require a showing of intentional prosecutorial misconduct. *See, e.g., Howell v. Barker*, 904 F.2d 889, 894-95 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990); *United States v. Canoy*, 38 F.3d 893, 901-02 (7th Cir. 1994); *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997).[5] Rather, under the balancing test, the extent of prejudice is weighed against the reasons for the delay. Where, as here, the prejudice is extreme, no showing of bad faith or negligence is required. *See Canoy*, 38 F.3d at 901-02.[6]

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[5] State courts of last resort are similarly divided. *Compare, e.g., United States v. Day*, 697 A.2d 31, 33 (D.C. App. 1997) (balancing test); *Scott v. State*, 581 So. 2d 887, 891 (Fla. 1991) (same); *State v. English*, 594 P.2d 1069, 1073 (Hi. 1978) (same); *People v. Park*, 400 N.E.2d 966, 968 (Ill. 1980), *cert. denied*, 499 U.S. 1085 (1981) (same); *State v. Schrader*, 518 So. 2d 1024, 1028 (La. 1988) (same), *cert. denied*, 498 U.S. 903 (1990); *State v. Varagianis*, 512 A.2d 1117, 1119 (N.H. 1986) (same); *State v. Denny*, 350 N.W.2d 25, 28 (N.D. 1984) (same); *State v. Luck*, 472 N.E.2d 1097, 1102 (Ohio 1984), *cert. denied*, 470 U.S. 1084 (1985) (same); *Fritz v. State*, 811 P.2d 1353, 1367 (Okla. 1991), *cert. denied*, __ U.S. __, 117 S. Ct. 966 (1997) (same), *with Gonzales v. State*, 805 P.2d 630, 631 (N.M. 1991) (bad faith test).

[6] *See also Howell v. Barker*, 904 F.2d 889, 891 (4th Cir.) (continued...)

This conflict between the circuits is of long duration and has been explicitly recognized by the circuits themselves. *See, e.g., Howell*, 904 F.2d at 895 ("[w]e cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation"). Dissenting from the denial of certiorari in *Hoo v. United States*, 484 U.S. 1035 (1988), Justice White stated: "[e]xemplifying the significant disagreement in the lower courts over the proper test, panels in the Fifth and Seventh Circuits have acknowledged conflicts between decisions from their own Circuits on this issue." *Id.* at 1036.[7]

The United States Solicitor General has recently acknowledged the split in the circuits on the issue of prejudicial prosecutorial delay and the need for this Court to resolve that issue. In the Solicitor General's Brief in Opposition to the petition for certiorari in *Crouch* (attached hereto as Appendix E), the Solicitor General acknowledged that (i) there is a split in the circuits on this issue, (ii) the issue is important, and (iii) the issue warrants this Court's review. (App. 57a, 60-61a). The Solicitor General opposed certiorari in *Crouch* because there was no finding of actual

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[6](...continued)

(government's convenience does not outweigh severe, substantial prejudice), *cert. denied*, 498 U.S. 1016 (1990).

[7] Since Justice White's opinion in *Hoo*, the Seventh Circuit has made clear that it follows the balancing test. *See Canoy*, 38 F.3d at 901-02. In *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), *cert. denied sub nom.*, 117 S. Ct. 736 (1997), the Fifth Circuit resolved its internal division in favor of a bad-faith intentional delay test.

prejudice and petitioners could not have carried the burden of proof even under the balancing test. Arguing that the petitioners in *Crouch* would not be entitled to relief under either of the competing legal standards, the Solicitor General urged that "review should await a case in which it becomes clear that the different tests would produce different outcomes." (App. 60-61a). This is just such a case.

In the present case, the district court, both before and after trial, found that the government's delay in prosecuting Mr. Mulderig caused actual and substantial prejudice to his defense. *See* App. 2a, 47-48a, 49a. This finding remained undisturbed on appeal. *See Mulderig*, 120 F.3d at 540. (App. 10-11a). Thus, the crucial and dispositive issue presented by this case is whether Mr. Mulderig must also show intentional prosecutorial misconduct in order to prove a due process violation. This case directly presents for review the conflict among the circuits on the standard for determining claims of preindictment delay; *and* the different tests at issue will clearly result in different outcomes when applied to the facts.

### B. The Due Process Clause Compels Adoption Of The Balancing Test

Petitioner submits that this Court should adopt the balancing test of the Fourth, Seventh, Eighth and Ninth Circuits. The balancing test, in focusing on principles of fairness, best serves the purposes of the Due Process Clause and is, as the Seventh Circuit has observed, consistent with the analysis set forth by this Court in *Lovasco*, 431 U.S. at 790 (the proper inquiry under the due process clause is whether a prosecution after a preindictment delay violated "fundamental conceptions of justice"). *See United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979).

This due process inquiry is not served by the two-part test's mechanical criterion that the defendant in every case show intentional misconduct by the prosecution. Blindly requiring intentional misconduct without regard to the events of the particular case directly contradicts the principles established by this Court in *United States v. Marion*, 404 U.S. 307 (1971). In *Marion*, this Court held that "[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment *based on the circumstances of each case.*" *Id.* at 325 (emphasis added). Accordingly, in *Marion*, the Court declined to determine, and, indeed, explicitly stated that it could not determine, "when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Id.* at 324.

For this reason, Chief Judge Henry Politz of the Fifth Circuit, dissenting in *Crouch*, concluded that "both *Lovasco* and *Marion* . . . teach that the administration of justice, in the context of a defendant's right to a fair trial, necessitates a case-by-case inquiry," in which the courts "'must consider the reasons for the delay as well as the prejudice to the accused.'" *Crouch*, 84 F.2d at 1524 (Politz, C.J., dissenting) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

In adopting the balancing test, the Fourth Circuit emphatically criticized the two-part test as running afoul of the constitutional concerns that underlie the Due Process Clause:

> Taking this position [the two-part test] to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face,

> would violate fundamental conceptions of justice, as well as the community's sense of fair play.

*Howell*, 904 F.2d at 895. In his dissent in *Crouch*, Chief Judge Politz excoriated the two-part test for its failure to provide justice in the individual case:

> Today's decision directs that despite the severity of the prejudice to the defendant, and ignoring the length of the pre-indictment delay, if a defendant cannot prove improper prosecutorial motive, no due process violation may occur. This is, to me, a smothering of fundamental concepts of justice and the community's sense of fair play. I would balance the actual prejudice as found by the district court against the government's assigned reasons for the delay and, in that setting, determine whether there has been a due process violation.

*Crouch*, 84 F.3d at 1525.

The factual and legal circumstances of the present case render the due process issues raised by Mr. Mulderig's prosecution all the more compelling. Under normal circumstances, statutes of limitations "provide the 'primary guarantee against bringing overly stale criminal charges.'" *Lovasco*, 431 U.S. at 789, 97 S. Ct. at 1048 (quoting *United States v. Marion*, 404 U.S. 307 (1971)). The longer, however, the limitation period, the less protection it provides against the prejudicial effects of the passage of time, including the death of witnesses, faded memories, and lost evidence. In this case, the limitations period, extended from its previous five year period to cover a full decade, provides virtually no protection against the filing of stale claims by the government.

Where, as here, the defense is predicated on corporate documents that would not normally be retained for ten years and on decade-old memories of the details of complex financial negotia-

tions and transactions, *any* defendant would be at a tremendous disadvantage in defending himself at trial. In Mulderig's case, the difficulties rose to the level of extreme prejudice owing, *inter alia*, to (i) the loss of the exculpatory testimony and documents of his accountant and financial adviser, James Burns, (ii) the loss of Mr. Mulderig's own files detailing the transactions in issue, and (iii) the destruction of documents in the possession of Chemical Bank, which does not retain documents for more than five years.

Due process concerns are further heightened by the fact that the government assured Mr. Mulderig that he was not a target for investigation and prosecution, thus contributing to his failure to preserve exculpatory evidence and take other steps necessary to his defense. It was not, in fact, until after the government had learned that James Burns had died of brain cancer and that the files of Burns and Mulderig had been lost or disposed of that an indictment was returned against Mulderig.

Finally, courts adopting the two-part test have invoked the undesirability of second guessing prosecutorial determinations as to when to proceed with indictments. In the context of pre-indictment delay, however, prosecutors are amply protected from such second guessing by the nearly insurmountable requirement that a defendant demonstrate actual and substantial prejudice caused by the delay. *See United States v. Sowa*, 34 F.3d 447, 450-52 (7th Cir. 1994) (terming the actual and substantial prejudice requirement a "monumental hurdle"), *cert. denied*, 513 U.S. 1117 (1995). As this Court noted in *Lovasco*, because defendants so rarely are able to establish actual, substantial delay, the courts have had no "sustained opportunity to consider the constitutional significance of various reasons for delay." 431 U.S. at 797. Thus, the rare occasions which will require examination of prosecutorial motive in delaying an indictment do not justify judicial fears of interfering with prosecutorial judgments. As there is no reason to believe that instances of actual and substantial

prejudice will be more often or more easily demonstrated in the future, the danger of adversely affecting prosecutorial judgments and causing prosecutors to indict prematurely is remote, if not non-existent.

### C. Discovery Should Be Allowed On The Issue Of Prosecutorial Motive

No matter which test this Court adopts for determining improper prosecutorial delay, the defendant's procedural rights in attempting to demonstrate a due process violation should also be addressed. In particular, the Court should determine whether the defendant has the right to discovery as to the government's reasons for delaying the indictment of the defendant. After requiring Mr. Mulderig to prove a bad-faith purpose on the part of the government, the Fifth Circuit affirmed the district court's denial of all discovery on that topic and approved the district court's determination of that issue through an *ex parte, in camera* inspection of documents which were selected by the government and to this day have not been shown to the defendant. *See* App. 10-11a. The petitioner submits that this denial of discovery and cross-examination deprived Mr. Mulderig of the ability to prove a due process violation based on preindictment delay. This denial constitutes an independent due process violation.

Decisions by other courts, while not specifically addressing this issue, indicate that discovery has been allowed as to the government's reasons for preindictment delay. *See, e.g., Ross*, 123 F.3d at 1184-85 (noting that defendant's counsel had deposed original prosecutor about reasons for preindictment delay). *See also United States v. Surface*, 624 F.2d 23, 25 n.2 (5th Cir. 1980) (recognizing it would be appropriate for defendant to obtain evidence as to the government's reasons for delay through discovery of U.S. Attorney's files); *Crouch*, 84 F.3d at 1523 & n.45 & n.46

(contemplating discovery and an adversarial hearing on remand on issue of preindictment delay).

In sum, petitioner submits that this Court should take the opportunity presented by this case to: (i) address the standard for establishing a due process violation resulting from preindictment delay and (ii) provide guidance concerning the defendant's right to discovery on the government's reasons for delaying the indictment.

## II. IN HOLDING THAT A CRIMINAL DEFENDANT CAN UNKNOWINGLY WAIVE A STATUTE OF LIMITATIONS DEFENSE WHERE THE DEFENSE WAS RAISED PRIOR TO SENTENCING AND WHERE THERE WAS NO EXPRESS WAIVER, THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH THE TENTH AND SIXTH CIRCUITS

After trial but before sentencing, Mulderig moved for a judgment of acquittal on two of the three Counts under which he was convicted on the grounds that his "trial" and "punishment" occurred beyond the five year limitation period for Section 1008 provided in 18 U.S.C. § 3282. The ten year statute of limitations provided by 18 U.S.C. § 3293 was in effect at the time of Mulderig's indictment, but was repealed just prior to his trial. The five year limitation period of 18 U.S.C. § 3282 again became effective upon the removal of Section 1008 offenses from Section 3293.

In a hearing on Mr. Mulderig's post-trial motion, the district court ruled on the merits of Mulderig's statute of limitations defense. On appeal, however, the Fifth Circuit refused to address the merits of Mulderig's defense, instead holding that Mr. Mulderig had waived the defense of the statute of limitations by not raising it during his trial. *Mulderig*, 120 F.3d at 540. (App.

11a). It is undisputed that Mr. Mulderig at no time expressly or knowingly waived the statute of limitations defense, or took any affirmative action (*e.g.*, pleading guilty or requesting that the jury be instructed on a lesser included defense that was time-barred) that would result in waiver of the statute of limitations.

### A. There Is a Split in the Circuits On This Issue

The Fifth Circuit's ruling that Mulderig had waived the statute of limitations defense by not raising it before the jury's verdict is in direct conflict with decisions by the Tenth and Sixth Circuits, which hold that waiver of a criminal statute of limitations may only be effected expressly and knowingly and that the mere failure to raise such a defense at or before trial does not waive the right of a defendant to raise it after trial, including for the first time on appeal. *See Waters v. United States*, 328 F.2d 739 (10th Cir. 1964); *United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992) (following *Waters* and requiring an express waiver); *United States v. Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989). Indeed, the circuit courts have expressly recognized that there is a conflict of authority on this issue. *See United States v. Williams*, 684 F.2d 296, 300 (4th Cir. 1982) (noting "split in authority").

In *Waters*, the Tenth Circuit held that although the appellant raised the three year statute of limitations applicable in his case for the first time on appeal, the statute constituted a bar to prosecution and punishment. *See* 328 F.2d at 742. In support of its decision the Tenth Circuit stated that the statute of limitations was "in consonance with a policy of repose 'that is fundamental to our society and our criminal law.'" *Id.* (quoting *Bridges v. United States*, 346 U.S. 209 (1953)). The Tenth Circuit went on to explain, "[u]nlike the statute of limitations in civil cases, it is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused." *Id.* at 743.

### B. Due Process Requires An Express and Knowing Waiver of a Criminal Statute of Limitations Defense

While a defendant's express waiver of the statute of limitations "is a binding agreement not to object to the filing of charges beyond the period of limitations," absent such an agreement "the clear language of the statute of limitations prohibits the government from prosecuting beyond that time." *Cooper*, 956 F.2d at 962. Therefore, "[a]llowing the government to do so simply on the strength of a defendant's mistaken notion that a valid charge was pending against her would be to change the statute of limitations from a law into a mere suggestion." *Id.*

Such a result (which is precisely the result of the Fifth Circuit's finding of waiver in this case) offends the purposes underlying statutes of limitations governing criminal laws. This Court has defined those purposes as follows:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.

*Toussie v. United States*, 397 U.S. 112, 114-15 (1970). To find, as the Fifth Circuit did in this case, that a defendant has waived a statute of limitations defense unknowingly, particularly where, as here, that defense became available through a change in the law that took place after the defendant's indictment and was not officially published until after trial, both ignores the intent of Congress and strips the defendant of what this Court has termed "the

primary guarantee against bringing overly stale charges." *Lovasco*, 431 U.S. at 789.

In many of the decisions in which a criminal defendant was held to have waived the statute of limitations, even without explicitly stating that waiver, the operative circumstances differ significantly from the circumstances present here in that the defendant had taken an affirmative act which is found to constitute a waiver. For example, in *Acevedo-Ramos v. United States*, the First Circuit held that a defendant who had pleaded guilty had thereby waived the statute of limitations. 961 F.2d 305, 308 (1st Cir.), *cert. denied*, 506 U.S. 905 (1992). *Cf. Williams*, 684 F.2d 296 (facing a charge, such as murder, with no time bar, a defendant waives the statute of limitations on a lesser included offense when he requests that the jury be instructed on that offense); *but see Cooper*, 956 F.2d at 962 (dismissing charges against defendant who asserted a statute of limitations defense after pleading guilty).

Finally, in this case, by the plain terms of the statute of limitations, Mr. Mulderig's assertion of the limitations bar was timely. That statute provides that "no person shall be prosecuted, tried, *or punished* . . . unless the indictment is found or the information is instituted within five years [of the offense]." 18 U.S.C. § 3282 (emphasis added). By is plain language, the statute bars the government from three separate and independent acts, if the period of limitations has passed: prosecuting the defendant, trying the defendant, and *punishing* the defendant. Even assuming *arguendo* that Mr. Mulderig waived his right not to be prosecuted and his right not to be tried, Mulderig cannot be held to have waived his right not to be punished, because he asserted the statute of limitations defense in the district court *before* sentencing.

## III. IN HOLDING THAT A FACTUALLY TRUE STATEMENT CAN BE THE BASIS OF A CONVICTION UNDER 18 U.S.C. § 1008, THE FIFTH CIRCUIT HAS MISINTERPRETED THAT STATUTE AND CONTRAVENED THE REASONING OF *BRONSTON v. UNITED STATES*, 409 U.S. 352 (1973)

Count 2 of the indictment, a charge of filing a false statement brought against Mr. Mulderig under 18 U.S.C. § 1008,[8] was predicated on Mulderig's filing of an admittedly true and accurate K & K financial statement, dated July 23, 1984, with federal bank regulators. The government's theory at trial was that Mulderig, at the request of officials at Gulf Federal, submitted the July 1984 financial statement to the bank after the Cypress Park loan had closed on December 28, 1984. The bank officials made this request, the government claimed, to give federal regulators the false impression that the loan file had been complete prior to the closing on the loan. The government alleged at trial that Mulderig complied with this request and in so doing was complicit in the bank's effort to deceive federal regulators.[9]

There is no dispute that the K & K financial statement itself was factually true when made in that it presented an entirely accurate picture of the financial condition of K & K on July 23, 1984. Witnesses called by the government, including an official from the Office of Thrift Supervision, testified that they would have regarded the financial statement as a statement of K & K's

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[8] A copy of 18 U.S.C. § 1008 is attached hereto as Appendix F. (App. 65a).

[9] Evidence discovered after trial demonstrates that the financial statement was submitted in connection with an entirely unrelated transaction.

condition as of July 23, 1984, regardless of when the statement was ultimately submitted to the bank. This testimony was unrefuted.

The issue here is whether a factually true statement can be the basis for a false statement charge under Section 1008. In the instant case, the government never alleged any falsity as to the content of the July 23, 1984 financial statement, but rather alleged falsity only as to the time in which the statement was filed with the bank, a fact having nothing to do with the document itself.

In affirming Mr. Mulderig's conviction under Section 1008, the Fifth Circuit contravenes the reasoning of *Bronston v. United States*, 409 U.S. 352, 357-58 (1973), in which this Court held that even though a defendant's statement under oath may have been intended to mislead the questioner, the defendant was not guilty of perjury because his statement was literally true. Several other circuits have applied *Bronston* to reverse perjury convictions based on literally true statements. *See United States v. Lighte*, 782 F.2d 367, 373-74 (2d Cir. 1986); *United States v. Sainz*, 772 F.2d 559, 564 (9th Cir. 1985); *United States v. Vesaas*, 586 F.2d 101, 103-04 (8th Cir. 1978); *United States v. Laikin*, 583 F.2d 968, 970-71 (7th Cir. 1978).

Courts have applied the reasoning of *Bronston* to reverse convictions for the filing of false statements where, as here, the statements were literally true. *See United States v. Isaacs*, 539 F.2d 686, 688 (9th Cir. 1976); *United States v. Lozano*, 511 F.2d 1, 4-5 (7th Cir. 1975); *United States v. Diogo*, 320 F.2d 898, 903-09 (2d Cir. 1963). The Ninth Circuit, in *United States v. Mayberry*, 913 F.2d 719, 723 (9th Cir. 1990), held that a defendant was not guilty of filing a false financial statement with a bank because, although the statement created a misleading impression as to the ownership of money in an account, the statement was literally true. The reasoning of these cases dictates

that Mulderig should have been acquitted on Count 2 since a Section 1008 violation cannot be found where a defendant submits a literally true financial statement to his bank.

Because prosecutions for "false statements" may be brought under 18 U.S.C. §§ 1005, 1006, and 1007 in addition to Section 1014, which supplanted Section 1008, the issue presented by the Fifth Circuit's holding is likely to be repeated. For this reason and owing both to the intrinsic importance of the issue and the conflict between this Court's precedent and the Fifth Circuit's ruling, this Court should grant the petition for certiorari. *See* Sup. Ct. R. 10(c).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Douglas W. Dunham*
Michael D. Rips
Ellen P. Quackenbos
William J. Hine
**Counsel of Record*